

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
SAIME DISCOUNT, LTD.	:	DETERMINATION
AND KANAT ARBAY, AS OFFICER	:	
for Revision of Determinations or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period December 1, 1980	:	
through November 30, 1981.	:	

Petitioners, Saime Discount, Ltd., and Kanat Arbay, as officer, 75 Taconick Road, Greenwich, Connecticut 06830, filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1980 through November 30, 1981 (File Nos. 801109 and 801110).

A hearing was held before Catherine M. Bennett, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on December 6, 1989 at 1:15 P.M. Petitioners appeared by Jack M. Portney, C.P.A. The Division of Taxation appeared by William F. Collins, Esq. (Irwin Levy, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation properly determined petitioners' additional sales and use taxes due on their gasoline service station operations.

II. Whether petitioner Kanat Arbay was a person required to collect tax on behalf of the corporate petitioner and is thus liable for unpaid sales and use taxes due.

FINDINGS OF FACT

On February 24, 1984, the Division of Taxation issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner Saime Discount, Ltd., for the period December 1, 1980 through November 30, 1981, containing the following explanation:

"The following taxes have been determined to be due in accordance with section 1138 of the Tax Law, and are based on an audit of your records."

It asserted additional tax due of \$163,515.94, plus penalty and interest totalling \$136,630.49, for a total amount due of \$300,146.43. On the same date, an additional Notice of Determination and Demand for Payment of Sales and Use Taxes Due was issued to petitioner Kanat Arbay, as officer of Saime Discount, Ltd., in the same amounts as noted above asserting liability as follows:

"You are personally liable as officer of Saime Discount, Ltd. under Sections 1131(1) and 1133 of the Tax Law for the following taxes determined to be due in accordance with Section 1138(a) of the Tax Law."

The taxes due for the various periods have been broken down as follows:

<u>Period Ended</u>	<u>Tax Due</u>	<u>Fraud Penalty Due</u>	<u>Interest</u>	<u>Total</u>
2/28/81 381	\$25,273.01	\$12,636.51	\$10,082.41	\$ 47,991.93
5/31/81 481	33,347.30	16,673.69	12,234.48	62,255.47
8/31/81 182	41,947.57	20,973.79	13,950.08	76,871.44
11/30/81 282	62,947.99	31,474.00	18,605.53	<u>113,027.52</u>
				<u>\$300,146.36¹</u>

Petitioner Saime Discount, Ltd. operated an Amoco gasoline service station at Dutch Broadway and Corona Avenue in Valley Stream, New York, from December 1, 1980 through November 30, 1981. The station had five gas pumps, and it was determined that no repair work was done at this station. Kanat Arbay was president and owner of Saime Discount, Ltd.

Initially, this case was assigned to Andrew Coughlin of the Special Investigations Bureau late in 1982. Mr. Coughlin visited the Amoco service station on October 22, 1982, after

¹This total differs from the total amount due as per the summary of tax liability due to a \$.07 discrepancy for one of the quarters representing an amount of tax due.

the business was no longer owned by Kanat Arbay. At that point in time, it was being operated as Meryem Discount² and was owned by Yilmaz Toksoy. At the same time, Mr. Coughlin was investigating Saime Discount, Ltd., he also was responsible for the review of the books and records of various other service stations owned by Kanat Arbay. Mr. Coughlin was informed that Jack Portney, C.P.A., would handle the service station investigations and represent Kanat Arbay. It is from Mr. Portney that Mr. Coughlin requested books and records on or about October 25, 1982. Although it is unclear from the record which books and records were specifically requested, it appears as though books and records pertaining to cash receipts and business operations were among those requested by Mr. Coughlin.

Approximately at the same time, Mr. Coughlin subpoenaed Amoco, the gasoline supplier, for information pertaining to purchases made by Kanat Arbay for the gasoline service station in question. He was able to obtain monthly statements covering the period November 30, 1980 through November 30, 1981, indicating that certain purchases were made by the owner or operator of the station, Kanat Arbay, designated by customer number 53287. There is testimony that indicates that the customer number assigned by the dealer remains the number assigned to a particular station location whereas the name of the customer changes if the supplier is aware that the station is being operated by a new owner. During this time, Mr. Coughlin was also able to obtain the sales tax returns filed by Mr. Arbay from New York State tax records in Albany. While Mr. Portney was preparing to submit various books, records and documents from petitioners' business, Mr. Coughlin analyzed the information obtained from Amoco. He prepared a schedule which showed the breakdown of gallons purchased for each type of gasoline per month from December 1980 through October 1981, and computed the total cost of the gasoline based on the particular price of that type. He compared those figures to the taxable sales reported on Mr. Arbay's tax returns and calculated a difference upon which he computed an additional tax due of \$139,208.97.

²Testimony in the record also refers to the subsequent owner as "Yilmaz Discount" at various times during the hearing.

In approximately April 1983, the Special Investigations Bureau ceased its operation and the files being handled by Mr. Coughlin were then transferred to various local district offices. Petitioners' case herein was transferred to the Mineola District Office at which point an assessment had not been issued, nor had the investigation been completed. Subsequent to the time that Mr. Coughlin no longer retained the file for Saime Discount, Ltd., Mr. Portney contacted him with certain of the business's books and records. When Mr. Portney asked what he should then do with the records, he was instructed by Mr. Coughlin to "wait until the auditor gets in touch with you and give it to him". The file was then assigned to Kathleen Day, formerly Kathleen Kennedy, a sales tax auditor, of the Mineola District Office.

Mrs. Day testified that the case was assigned to her only to work up an assessment and not as an audit. As a result, she utilized only the records that were already contained within the file: bank statements showing deposits, third-party verification from Amoco Oil Company and sales tax returns filed by Kanat Arbay for Saime Discount, Ltd. Mrs. Day never contacted petitioners nor requested additional information. She merely utilized the information obtained by Mr. Coughlin in the previous few months to produce the notices of determination at issue herein.

Mrs. Day determined that gasoline purchases per the Amoco verification statements for the period December 1, 1980 through November 30, 1981, were \$2,055,689.00. These purchases were marked up an estimated 15% based on an average statewide markup utilized in similar audits performed during that time by Mrs. Day. This resulted in audited taxable gas sales of \$2,364,042.00. In addition, oil purchases per the Amoco statements of \$15,729.00 were also marked up an estimated 80%, which resulted in audited taxable oil sales of \$28,312.00. Thus, the total of audited taxable sales of gas and oil amounted to \$2,392,354.00 as compared to reported taxable sales during this period of \$87,143.00. The additional sales tax due computed on this difference was \$163,515.94.

In addition to computing the assessment, Mrs. Day also made a comparison of bank deposits of \$1,736,509.00, which had been made during the same taxable period for which

taxable sales of \$87,143.00 had been reported.

Jack Portney, a Certified Public Accountant, appeared on behalf of petitioner to represent his position. Mr. Portney explained that Kanat Arbay was the Turkish ambassador to the State of Pennsylvania and was in a very high level of business in Turkey. Mr. Portney testified that, in years preceding and during the period at issue, when Mr. Arbay came to the United States his association with the gasoline companies overseas enabled him to obtain large allocations of gasoline during the years 1979 through 1981 when gasoline was in very short supply. Mr. Arbay obtained gasoline not only for his own retail sale purposes but also for resale. Mr. Portney further described Mr. Arbay's association with other Turkish gas station owners who were unable to obtain as great an allocation of gasoline for retail sale, and stated that they would pump the gasoline from Mr. Arbay's stations during the night when his business was not in operation with a special pump purchased for that particular purpose.

By the time Mr. Portney had invoices, resale certificates and other documentation together which purportedly exonerated petitioners, the Special Investigations Bureau had long been terminated. Since Mr. Coughlin's division was terminated, and Mrs. Day was not placed in the position to perform any audit procedures, the first opportunity Mr. Portney was given to submit this information on behalf of petitioners was at the conference level.

The evidence submitted by Mr. Portney on behalf of petitioners' resale contention was as follows:

(a) Sales invoices covering the period February 1981 through November 1981 showing sales of various types of gasoline to Sevinc and Ahmet Batur at 2 Saratoga Boulevard, Island Park, New York, and Apokan Discount, 189 Sunrise Highway, Amityville, New York (which is owned and operated by Abdullah Nevrushan) totalling \$1,868,684.00.

(b) Two resale certificates showing Sevinc Batur and Abdullah Nevrushan as purchasers of tangible personal property for resale from Saime Discount, Ltd., principally engaged in the business of a gasoline service station, dated January 19, 1981 and January 28, 1981, respectively.

(c) As an analysis of the sales information from petitioner's records, Mr. Portney presented a schedule of purchases of gasoline between February 1981 and November 1981, offset by sales for resale in gallons and dollars as well as retail sales to customers.

(d) A statement in Turkish, which Mr. Portney claims is notarized, as well as an English translation of the same, by Abdullah Nevruzhan which states as follows:

"I own several gas stations from 1978 through 1983 and purchased the majority of my gasoline purchases from the gas stations on Long Island owned by Mr. Kanat Arbay, during the above periods. My gasoline trucks and drivers would pick up the gasoline at night after the stations had closed by pumping directly from the ground tanks into the truck with portable pumps.

I hope this will clarify the circumstances regarding my relations with Mr. Kanat Arbay and his gas stations. Respectfully submitted
Abdullah Nevruzhan."

It is noted that the statement in the English translation is not dated; however, it does appear as though the Turkish copy bears a date stamp and date within the body of the notarization of "19/6/1984."

(e) A letter from the Nassau Fire Commission dated March 21, 1980, addressed to Mr. Kanat Arbay, c/o Merrick Discount Center, Ltd., a Power Test gasoline service station also being operated by Mr. Arbay during an overlapping period. Although the letter pertains to another gas station owned by Mr. Arbay, Mr. Portney's explanation for the submission of this evidence is that it happened to be a complaint lodged against a specific station for activities that were taking place similarly with all of Mr. Arbay's stations, and those such activities are described within this correspondence. The letter addresses the transporting of gasoline fuel and the requirement that an explosive proof pump with appropriate extension cord be used for such purpose.

(f) A letter of verification from the Henrich Petroleum Equipment Company, Inc. dated July 10, 1985, stating that Kanat Arbay purchased a Blackmer explosion proof pump from this corporation during the year 1978, and that since the business was unable to locate the invoice, this letter was being submitted as part of the proof of purchase.

SUMMARY OF THE PARTIES' POSITIONS

Petitioner does not dispute the gasoline and oil purchases verified by Amoco, but submits evidence and contends that a substantial portion of the gasoline so purchased was for resale, and that the Division of Taxation's rejection of such evidence is without foundation.

The Division of Taxation relies on the supplier verification and asserts additional taxable sales. It rejects the sales invoices as unofficial records because they are:

- a) handwritten;
- b) not pursuant to a written contract;
- c) hearsay; and
- d) not sequentially numbered.

CONCLUSIONS OF LAW

A. The Tax Law imposes a sales tax on the receipts from the retail sale of tangible personal property (Tax Law § 1105[a]). A "retail sale" is generally defined as a sale of tangible personal property for any purpose other than for resale or for use in a taxable service where the property sold becomes a physical component of the property serviced or is actually transferred to the purchaser of the service (see, Tax Law § 1101[b][4][i]). A vendor is obligated to maintain records of his sales for audit purposes (Tax Law § 1135) and the Division, when conducting an audit, must determine the amount of tax due "from such information as may be available" but "if necessary, the tax may be estimated on the basis of external indices" (Tax Law § 1138[a][1]). When conducting an audit, the Division of Taxation may not simply ignore a taxpayer's records if those records provide an adequate basis on which to determine the amount of tax due (Matter of Chartair, Inc. v. State Tax Commn., 65 AD2d 44).

To determine the adequacy of the taxpayer's records, the Division must first request and thoroughly examine the taxpayer's books and records for the entire period of the proposed assessment (Matter of King Crab Restaurant v. Chu, 134 AD2d 51). The purpose of this examination is to determine whether the records are so insufficient as to make it virtually impossible for the Division to verify taxable sales receipts and conduct a complete audit (Matter

of Chartair, Inc. v. State Tax Commn., supra). Considerable latitude is given to the auditor where the taxpayer's records are inadequate. It is only necessary that the Division select an audit method reasonably calculated to reflect the tax due and then it is incumbent upon the petitioner to establish that the result of the method used is unreasonably inaccurate or that the amount of tax assessed is erroneous (Matter of Meskouris Brothers v. Chu, 139 AD2d 813). In this case, it is unclear that an adequate request for records was made in the first instance. Apparently, the Special Investigations Unit was instructed to review and investigate the operations of a multitude of gasoline stations during a brief period of time. Before such investigations were complete in their entirety, files were closed and transferred to a different division with an apparent lack of communication between the two offices. Assuming, *arguendo*, that the request for records was complete, it is next important to determine whether the records were deemed so insufficient as to make it impossible to verify taxable sales and conduct a complete audit. No evidence presented by the Division supports that the records were insufficient to that extent. Mr. Coughlin did not testify that he requested gasoline supplier information because records were insufficient. Assuming that it was impossible to determine petitioners' tax liability solely from the corporate records, resort to outside indices, such as the purchases from Amoco, was proper (Matter of Urban Liquors, Inc. v. State Tax Commn., 90 AD2d 576; Matter of Cousins Service Station, Inc., Tax Appeals Tribunal, August 11, 1988). It was the auditor's duty to select a method of audit reasonably calculated to reflect the taxes due (Matter of W. T. Grant Co. v. Joseph, 2 NY2d 196, cert denied 355 US 869). In view of the enormous discrepancy between the corporation's reported sales and its bank deposits for the same period, and the equally significant discrepancy between its reported sales and purchases per supplier information, the Division was warranted in questioning the adequacy of petitioners' records and giving serious consideration to an estimate based on third-party verification. Even if one argues that the most accurate way to verify taxable sales in this case was by third-party verification, the next crucial step in the transaction was simply ignored by the Division of Taxation, i.e., the resale. The burden was then placed upon petitioner to show by clear and

convincing evidence that the audit methodology was unreasonable or that the results obtained were erroneous (Surface Line Operators Fraternal Organization v. Tully, 85 AD2d 858).

B. As noted above, the definition of retail sale expressly excludes purchases of tangible personal property for resale as such. A vendor who receives a properly completed resale certificate, Form ST-120, is not liable for failure to collect sales tax, even if the purchaser erroneously gave such certificate, unless the vendor has knowledge of the falsehood. Even if a resale certificate is not produced, the vendor may claim the sale is not subject to tax if he is able to show that the sale qualifies for the resale exclusion (Matter of Ruemil Contract Interiors, Inc., State Tax Commission, September 9, 1983).

C. Mr. Arbay alleges that he was able to obtain enormous allocations of gasoline and did so for the purpose of resale to various friends and business acquaintances who were unable to obtain gas during this period of shortage. Although petitioners did not produce a contract which supported the allegations of sale obligations to Apokan Discount and Ahmet Batur, they were able to produce sales invoices for substantially all the months of the period in question. These sales invoices are supported by resale certificates completed by the parties to whom these sales were made. One of the parties even gave a statement explaining his relationship to Kanat Arbay and his gasoline purchases. Petitioners further buttressed their case with information regarding the explosion-proof pump purchased for the purpose of pumping gasoline from the delivery site to another tank or truck.

D. Petitioners have met their burden of proving that the results of the investigation and that portion of the audit so performed resulted in an erroneous assessment. The Division of Taxation's objections to the resale certificates as well as the sales invoices representing sales of gasoline for resale are without merit. The lack of a contract representing ongoing sales of gasoline, the lack of numerical sequence of the sales invoices and the handwritten nature of the documents is insufficient evidence to deem the records unofficial and nonsupportive of petitioners' position. It is clear in this case that the Division of Taxation grossly and deliberately overlooked the records supporting the resale of gasoline by petitioners.

E. Since it has been determined that there is no liability due, the issue of whether Kanat Arbay was a person required to collect tax need not be addressed.

F. The petition of Saime Discount, Ltd. and Kanat Arbay is granted and the notices of determination and demands for payment of sales and use taxes due, dated February 24, 1984, are hereby cancelled.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE